

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GEORGE L. KIRBYSON,) Case No. 09-3990 SC
Plaintiff,)
v.) ORDER RE DEFENDANTS'
TESORO REFINING AND MARKETING) MOTIONS FOR SUMMARY
COMPANY; UNITED STEEL WORKERS,) JUDGMENT, OR IN THE
INTERNATIONAL UNION LOCAL 5, and) ALTERNATIVE, SUMMARY
DOES 1 through 200, inclusive,) ADJUDICATION
Defendants.)
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I. INTRODUCTION

17 Before the Court are two motions for summary judgment, or in
18 the alternative, summary adjudication, filed by Defendant United
19 Steel Workers, International Union Local 5 ("the USW") and
20 Defendant Tesoro Refining and Marketing Company ("Tesoro")
21 (collectively, "Defendants"). ECF Nos. 73 ("USW Mot."), 75
22 ("Tesoro Mot."). Both motions are fully briefed. ECF Nos. 76
23 ("Opp'n to USW Mot."), 78 ("Opp'n to Tesoro Mot."), 83 ("USW
24 Reply"), 86 ("Tesoro Reply"). For the following reasons, the
25 Court GRANTS the USW's Motion and GRANTS IN PART and DENIES IN
26 PART Tesoro's Motion.

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1 **II. BACKGROUND**

2 This case involves Tesoro's termination of Plaintiff's
3 employment and the USW's subsequent handling of Plaintiff's
4 grievance against Tesoro. Unless otherwise noted, the following
5 facts are undisputed.

6 Plaintiff joined the U.S. Air Force ("USAF") in 1994, and
7 transitioned into the Air Force Reserve in 1999. Second Hewitt
8 Decl. ¶ 3 Ex. A ("Second Kirbyson Decl.") ¶ 2.¹ Plaintiff worked
9 as an oil refinery operator for Tesoro. Id. On January 5, 2005,
10 Plaintiff was recalled to active duty, and Tesoro placed him on a
11 military leave of absence. Id. ¶ 4. While serving in Iraq,
12 Plaintiff developed pain in his left foot and was diagnosed with
13 Achilles tendinitis. Id. ¶ 6. He underwent surgeries for this
14 condition in January 2006 and August 2007. Id. In 2008, while
15 still on active duty with the USAF, Plaintiff began experiencing
16 discomfort in the soles of both feet and was diagnosed with plantar
17 fasciitis. Id. ¶ 7. In October 2008, Plaintiff received notice
18 from the USAF that he would be medically retired the following
19 month due to his disabilities. Id. ¶ 8. He notified Tesoro of his
20 desire to return to work at the refinery. Id.

21 **A. Plaintiff's Termination by Tesoro**

22 On October 27, 2008, Plaintiff had a visit with Larry Angel
23 ("Angel"), a physician's assistant at Tesoro's Medical Department.
24 Id. ¶ 10. The visit lasted no more than thirty minutes. Id.

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¹ Shanan L. Hewitt ("Hewitt"), attorney for Plaintiff, filed
27 declarations in support of Plaintiff's Opposition to the USW's
28 Motion, ECF No. 77 ("First Hewitt Decl."), and in support of
Plaintiff's Opposition to Tesoro's Motion, ECF No. 79 ("Second
Hewitt Decl."). To each of her declarations, Hewitt attached
declarations from Plaintiff, which the Court refers to respectively
as "First Kirbyson Decl." and "Second Kirbyson Decl."

1 Plaintiff and Angel discussed the evolution of Plaintiff's foot
2 condition during his military service. According to Plaintiff,
3 Plaintiff informed Angel that his Achilles tendinitis had been
4 ongoing for quite some time, but he had only recently developed
5 plantar fasciitis. Id. ¶ 11. He informed Angel that he was
6 undergoing treatment with a podiatrist for his plantar fasciitis
7 and did not yet know the prognosis for that condition. Id.
8 Plaintiff informed Angel that, although he could perform the daily
9 duties of his previous position as an operator, he would not feel
10 comfortable in that position because he could not run if an
11 emergency situation arose. Id.

12 The parties dispute exactly what took place during Plaintiff's
13 visit with Angel. According to Plaintiff, the visit with Angel did
14 not include a physical examination, only a discussion. Id. ¶ 13.
15 Angel did not touch Plaintiff's foot or ask him to demonstrate any
16 movements. Id. Angel never asked Plaintiff about his specific
17 limitations such as the amount and duration of his ability to walk,
18 stand, climb, or squat. Id. Angel's notes from the visit
19 indicated that Plaintiff had ninety degrees dorsiflex in his left
20 foot, but Angel later acknowledged during deposition that this
21 dorsiflex measurement could not have been accurate and that his
22 notes should have stated ten degrees. Second Hewitt Decl. Ex. B
23 ("Angel Dep.") at 36:12-23. According to Plaintiff, Angel informed
24 Plaintiff that he would need to submit to a full physical
25 examination because he had been away from work for so long. Second
26 Kirbyson Decl. ¶ 13. Plaintiff agreed, but he was never contacted
27 to arrange a physical exam. Id. At the conclusion of the visit,
28 Plaintiff told Angel that he did not yet have the findings from the
USAF Medical Evaluation Board regarding his injuries but would

1 forward them to Angel when he received them. Id. ¶ 11. According
2 to Plaintiff, Angel informed Plaintiff during the visit that he did
3 not think Tesoro would accommodate Plaintiff. Id. ¶ 14.

4 On October 31, 2008, Plaintiff received his military
5 retirement paperwork and faxed it to Angel. Id. ¶ 15. The
6 documentation indicated the USAF's findings that Plaintiff was non-
7 deployable based on his foot condition. Kirbyson Dep. at 217:17-
8 25, 218:1-25, Ex. 18 ("USAF Med. Eval.").² The "remarks" section
9 of the document stated that Plaintiff was limited to "no running,
10 climbing, or standing for long periods of time." Id. Although
11 Angel admitted that he did not know what the USAF meant by "no
12 standing for long periods of time," he concluded that it meant
13 Plaintiff could not stand for more than ten minutes in a given
14 hour. Angel Dep. at 65:5-15. Plaintiff declared that Angel's
15 conclusion was not accurate. Second Kirbyson Decl. ¶ 17. Angel
16 did not confer with Plaintiff or his physician about the
17 conclusion. Angel Dep. at 71:12-25, 72:1-23. According to
18 Plaintiff's treating physician at the time, Dr. Jessi Tunguyen-
19 Conner, Plaintiff could perform normal daily activities such as
20 walking and standing subject only to Plaintiff monitoring his own
21 comfort level. Second Hewitt Decl. ¶ 5 ("Tunguyen-Conner Decl.") ¶
22 5.³ Plaintiff declared that at the time of his military

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24 ² Both Tesoro and the USW have filed excerpts of Plaintiff
25 Kirbyson's January 12, 2011, deposition as attachments to
26 declarations of their respective counsels. For the sake of
simplicity, the Court cites all references to this deposition
simply as "Kirbyson Dep."

27 ³ Tesoro objects to ¶¶ 5-7 of Tunguyen-Conner's declaration on
28 relevance grounds. Tesoro argues that Dr. Tunguyen-Conner's
conclusions regarding Plaintiff's physical limitations in 2008 are
irrelevant because Dr. Tunguyen-Conner stated in her deposition
that she had not treated Plaintiff for nine months as of November
2008, and her opinion was based on Plaintiff's representations to

1 retirement, he was capable of standing continuously for intervals
2 of approximately forty-five minutes each if allowed to sit for "a
3 few minutes" between intervals. Second Kirbyson Decl. ¶ 18.⁴
4 Plaintiff learned during discovery that Tesoro had a "Statement of
5 Impairment" form that could be completed by an employee's treating
6 physician to provide detailed information regarding the employee's
7 physical limitations, such as the precise number of minutes at a
8 time the employee could walk or stand, but Tesoro did not provide
9 the form to Plaintiff or his treating physician. Id. ¶ 13; Second
10 Hewitt Decl. ¶ 6 Ex. D.

11 Aside from his meeting with Angel, Plaintiff had only one
12 other meeting with a Tesoro representative prior to being
13 terminated. Id. ¶ 19. This meeting took place on November 12,
14 2008, when Plaintiff and Plaintiff's union representative, Steve
15 Rojek ("Rojek"), met with Tesoro's Human Resources representative,
16 Diane Daniels ("Daniels"). Id. The meeting lasted approximately
17 twenty minutes. Id. During this meeting, Daniels asked Plaintiff
18 what he thought he could do at the company. Id. ¶ 20. Plaintiff
19 presented Daniels with two job postings he had found on Tesoro's

20 her about his condition. Tesoro Reply at 8. The Court finds that
21 this does not render her opinion irrelevant, as it is still
22 probative of Plaintiff's physical limitations at the time of his
termination. The Court OVERRULES Tesoro's objection.

23 ⁴ Tesoro objects to ¶¶ 18 and 20 of Plaintiff's declaration on the
24 grounds that they contain statements that "are irrelevant, lack
25 foundation, and constitute inadmissible speculation and improper
opinion testimony." Tesoro Reply at 5 n.3. The only specific
26 explanation Tesoro gives for these objections is that Plaintiff's
27 statements regarding his current physical restrictions are
irrelevant to an analysis of Plaintiff's physical restrictions in
fall 2008, the relevant time period for this lawsuit. The Court
28 agrees and does not rely on Plaintiff's statements about his
current physical limitations. The Court finds the rest of the
paragraphs to be admissible and OVERRULES Tesoro's objections to
the extent they address statements other than those related to
Plaintiff's current physical condition.

1 internal website that he believed he was qualified and physically
2 able to perform: lab analyst and training coordinator. Id.
3 Daniels requested that Plaintiff provide her with his college
4 transcripts, which he later faxed to her. Id. According to
5 Plaintiff, Daniels did not inform Plaintiff of any job openings or
6 anticipated job openings at this meeting, nor did she discuss with
7 Plaintiff any accommodations that might enable him to continue
8 working with the company. Id. ¶¶ 21, 25, 26.

9 On November 20, 2008, Tesoro Human Resources Manager Rick Rios
10 ("Rios") wrote to Daniels, stating, "[y]ou will have to tell
11 [Plaintiff] we currently do not have any opening/jobs that he can
12 perform with or without accommodation. You should tell him we
13 looked into the lab too. Find out from [the corporate office in
14 San Antonio] how best to move him out of the organization." Second
15 Hewitt Decl. Ex. X ("Rios Email"). Daniels responded that she was
16 still looking at two positions - training coordinator and labor
17 custodian II. Id. Rios replied "OK, the training coord[inator]
18 position is an interesting possibility." Id.

19 After Plaintiff's November 12, 2008 meeting with Daniels,
20 Tesoro did not contact Plaintiff for approximately five weeks.
21 Second Kirbyson Decl. ¶ 22. During this period, Plaintiff
22 telephoned Daniels on several occasions. Id. ¶ 23. Each time,
23 Daniels informed Plaintiff that she had no further news for him.
24 Id. On December 22, 2008, Daniels telephoned Plaintiff and
25 informed him that his employment with the company had been
26 terminated. Id.⁵

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⁵ Upon learning of his termination, Plaintiff filed a claim with
the U.S. Department of Labor ("DOL") requesting an investigation of
Tesoro's compliance with the Uniformed Services Employment and
Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301 et

1 **B. Plaintiff's Union Grievance**

2 Plaintiff was a member of the USW. First Kirbyson Decl. ¶ 4.
3 Tesoro was, and currently is, signatory to a Collective Bargaining
4 Agreement ("CBA") with the USW, which governed the terms and
5 conditions of Plaintiff's employment with Tesoro. Id.; USW Mot. at
6 3. The CBA contains a multi-step procedure for resolving employee
7 grievances. See Hillman Decl. ¶ 2 Ex. 1 ("CBA") § 6.016.⁶
8 First, grievances shall be presented to the employee's supervisor
9 or foreman. Id. § 6.016(a). If the grievance is not resolved by
10 the foreman or supervisor, it may then be presented to a grievance
11 committee. Id. § 6.016(c). If not resolved by the committee, the
12 USW may request arbitration of the dispute by two arbitrators --
13 one selected by Tesoro and one by the USW. Id. § 6.016(d).
14 Lastly, if the grievance is not settled by these arbitrators within
15 ninety days of the arbitration request, it must be submitted to a
16 third arbitrator chosen from the American Arbitrator's Association.
17 Id.

18 Upon learning of his termination, Plaintiff contacted Rojek,
19 his union representative at the USW, and asked that a grievance be
20 filed regarding his termination. First Kirbyson Decl. ¶ 15. The
21 USW filed the grievance on December 29, 2008. Hillman Decl. ¶ 4
22 Ex. 3. On the same day, Plaintiff contacted Rojek and was informed
23 that the grievance had been filed but that it would not be
24 immediately processed because the USW was preparing to enter

25
26 seq. Second Kirbyson Decl. ¶ 32. On February 9, 2009, the DOL
27 sent Plaintiff a letter stating its findings. Id. Tesoro objects
28 to the DOL findings as inadmissible hearsay. The Court does not
 rely on the DOL findings in reaching its decision and therefore
 does not rule upon Tesoro's objection.

⁶ Kristina L. Hillman ("Hillman"), attorney for the USW, filed a declaration in support of the USW's Motion. ECF No. 74.

1 contract negotiations with Tesoro. First Kirbyson Decl. ¶ 16; USW
2 Mot. at 4. On January 6, 2009, Plaintiff contacted the USW
3 Secretary and Treasurer Jeff Clark ("Clark") about his grievance.
4 First Kirbyson Decl. ¶ 17. Clark reiterated to Plaintiff that the
5 USW's contract negotiations with Tesoro would be its top priority
6 until completed. Id.; USW Mot. at 5.

7 On January 26, 2009, Plaintiff again inquired about the status
8 of his grievance. First Kirbyson Decl. ¶ 19. Clark informed
9 Plaintiff that his grievance had been denied at the first step and
10 that nothing more was likely to happen regarding the grievance
11 until after contract negotiations were completed. Hillman Decl. ¶
12 7 Ex. 6 ("Clark email"). Plaintiff contends that he telephoned
13 both Clark and Rojek sometime in February 2009 but neither had
14 updates about the status of his grievance. First Kirbyson Decl. ¶
15 20. Plaintiff had no further communications with the USW about his
16 grievance before filing this action on August 28, 2009. Kirbyson
17 Dep. at 351:9-13, 352:4-12, 363:16-19. Plaintiff contends that the
18 USW failed to pursue the matter any further until prompted to do so
19 by this litigation. Opp'n to USW Mot. at 9. The USW contends that
20 it continued to pursue Plaintiff's grievance by, among other
21 things, engaging in an unsuccessful step two meeting with Tesoro
22 and requesting arbitration of the grievance in April 2009. USW
23 Mot. at 5-6.

24 In April 2009, Plaintiff was offered a job as a maintenance
25 supervisor with the Sacramento Regional Transit District. Kirbyson
26 Dep. at 291:21-25; 294:13-17. He accepted the offer and began
27 working for the District on July 1, 2009. Id.

28 On August 20, 2009, Tesoro sent a letter to Plaintiff's
counsel offering Plaintiff the position of cost control specialist,

1 subject to Plaintiff providing documentation that he had completed
2 his bachelor's degree and was physically able to meet the demands
3 of the mostly sedentary position. Chamberlin Decl. ¶ 2 Ex. A.
4 Plaintiff's counsel responded on September 8, 2009, stating that
5 Plaintiff had already obtained other employment and that Plaintiff
6 had filed a lawsuit against Tesoro. Id. ¶ 3 Ex. B.

7 On August 28, 2009, Plaintiff commenced this action against
8 Tesoro, the USW, and several employees of Tesoro and the USW ("the
9 individual defendants"). See ECF No. 1 ("Compl."). On December 3,
10 2009, Plaintiff filed a First Amended Complaint. ECF No. 15
11 ("FAC"). On March 2, 2010, the Court granted a motion to dismiss
12 filed by the individual defendants and granted in part a motion to
13 dismiss filed by Tesoro. ECF No. 32 ("Mar. 2, 2010 Order").
14 Plaintiff filed a Second Amended Complaint on March 30, 2010. ECF
15 No. 41 ("SAC"). In his SAC, Plaintiff only asserts claims against
16 Tesoro and the USW; he does not assert claims against the
17 individual defendants. Id. On June 10, 2010, the Court denied
18 Tesoro's motion to dismiss the SAC. ECF No. 52 ("June 10, 2010
19 Order"). On July 12, 2010, the Court granted in part the USW's
20 motion for judgment on the pleadings. ECF No. 56 ("July 12, 2010
21 Order"). The Court granted judgment on the pleadings in favor of
22 the USW on Plaintiff's claims for violation of the Americans with
23 Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and violation
24 of California Military and Veterans Code § 389. Id. The Court
25 denied the motion with respect to Plaintiff's claim for violation
26 of the duty of fair representation. Id.

27 In light of the Court's July 12, 2010 Order, Plaintiff's only
28 remaining claim against the USW is his claim for breach of the duty
of fair representation. Id. All six of Plaintiff's claims against

1 Tesoro remain, namely: (1) violation of the Uniformed Services
2 Employment and Reemployment Rights Act of 1994 ("USERRA"), 38
3 U.S.C. § 4301 et seq.; (2) violation of the ADA; (3) violation of
4 California's Fair Employment and Housing Act ("FEHA"), California
5 Government Code § 12900 et seq.; (4) wrongful termination in
6 violation of public policy; (5) violation of the California
7 Military and Veterans Code § 389 et seq.; and (6) breach of
8 contract. See SAC.

9 Both Tesoro and the USW now move for summary judgment, or in
10 the alternative, summary adjudication.

11

12 **III. LEGAL STANDARD**

13 "The standards and procedures for granting partial
14 summary judgment, also known as summary adjudication, are the
15 same as those for summary judgment." Mora v. Chem-Tronics,
16 Inc., 16 F. Supp. 2d 1192, 1200 (S.D. Cal. 1998). Entry of
17 summary judgment is proper "if the pleadings, the discovery
18 and disclosure materials on file, and any affidavits show that
19 there is no genuine issue as to any material fact and that the
20 movant is entitled to judgment as a matter of law." Fed. R.
21 Civ. P. 56(c). The movant bears the initial burden of
22 demonstrating the absence of a genuine issue of fact. See
23 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To
24 survive a motion for summary judgment, the responding party
25 must present competent evidence that creates a genuine issue
26 of material fact. See Anderson v. Liberty Lobby, Inc., 477
27 U.S. 242, 248-52 (1986). "The evidence of the nonmovant is to
28 be believed, and all justifiable inferences are to be drawn in
his favor." Id. at 255.

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2 **IV. DISCUSSION**3 **A. The USW's Motion**

4 In his only remaining claim against the USW, Plaintiff alleges
5 that the USW breached its duty of fair representation by "failing
6 to pursue Plaintiff's grievance in violation of the [CBA] and
7 processing Plaintiff's grievance in a perfunctory manner." SAC ¶
8 47. Plaintiff alleges that the USW's actions were "arbitrary,
9 discriminatory, and/or in bad faith." Id. ¶ 48. The USW moves for
10 summary judgment on the grounds that Plaintiff has failed to
11 present evidence that (1) his claim was timely filed or (2) the USW
12 engaged in arbitrary, discriminatory, or bad faith conduct.⁷ USW
13 Mot. at 2.

14 **1. Duty of Fair Representation Framework**

15 The duty of fair representation encompasses a labor union's
16 "statutory obligation to serve the interests of all members without
17 hostility or discrimination toward any, to exercise its discretion
18 with complete good faith and honesty, and to avoid arbitrary
19 conduct." Vaca v. Sipes, 386 U.S. 171, 177 (1967). A union's
20 discretion is very broad under the duty of fair representation
21 doctrine; the "Supreme Court has long recognized that unions must
22 retain wide discretion to act in what they perceive to be their
23 members' best interests." Peterson v. Kennedy, 771 F.2d 1244, 1253
24 (9th Cir. 1985). "[C]ourts should afford substantial deference to
25 a union's decisions" regarding "whether and to what extent it will

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28 ⁷ Plaintiff objects to certain portions of the declaration of Jeff
Clark filed in support of the USW's Motion on the grounds that the
portions are hearsay statements inadmissible under Federal Rule of
Evidence 801. The USW does not respond to the Plaintiff's
objections. The Court does not rely on any of the contested
statements in reaching its decision and therefore does not address
Plaintiff's objections.

1 pursue a particular grievance." Id. (internal quotation omitted).

2 A two-step analysis must be applied to determine whether a
3 union's conduct breached its duty of fair representation. First, a
4 determination must be made whether the alleged misconduct was
5 procedural or ministerial in nature, or whether it involved the
6 union's judgment. If the conduct is procedural or ministerial in
7 nature, then a plaintiff must establish that the conduct was
8 arbitrary, discriminatory, or in bad faith in order to show that
9 the union breached its duty. Wellman v. Writers Guild of Am.,
10 West, Inc., 146 F.3d 666, 670 (9th Cir. 1998). On the other hand,
11 if the conduct involved the exercise of judgment by the union, then
12 a plaintiff must show the conduct was discriminatory or in bad
13 faith; showing that the union's conduct was arbitrary will not
14 suffice. Id.

15 A union's decision about how to best handle a grievance is
16 generally a matter of judgment, as is its decision to not take a
17 grievance to arbitration. Id. at 671. But, to be sure that the
18 union is employing some principled way of screening the meritorious
19 grievances from the meritless ones, the Ninth Circuit has held that
20 "a union must conduct some minimal investigation of grievances
21 brought to its attention." Id. (internal citation omitted).
22 Consequently, when a union member brings a meritorious grievance,
23 the union's decision to ignore that grievance or to process it in a
24 perfunctory manner is considered a ministerial action that breaches
25 the union's duty if it is arbitrary, discriminatory, or performed
26 in bad faith. Id. Nevertheless, a court reviewing a union's
27 conduct will not find that the union has exercised its duties
28 perfunctorily unless it has treated the union member's claim so
lightly as to suggest an "egregious disregard" of her rights. Id.

1 (internal citation omitted).

2 2. The Handling of Plaintiff's Grievance

3 As an initial matter, the Court must determine whether the
4 USW's handling of Plaintiff's grievance was an act of judgment or a
5 ministerial act. Wellman, 146 F.3d at 670. The USW argues that
6 its conduct was a matter of judgment and therefore subject to
7 review for bad faith or discrimination only. Plaintiff does not
8 explicitly address the ministerial/judgmental dichotomy but appears
9 to argue that the USW's conduct was a ministerial act; Plaintiff
10 points to no evidence of bad faith or discrimination and argues
11 only that the USW handled his grievance in an arbitrary fashion.
12 See Opp'n to USW Mot. at 7, 9.

13 Under Wellman, USW's handling of the grievance was an act of
14 judgment so long as the union satisfied its duty to "conduct some
15 minimal investigation" and did not treat Plaintiff's claim "so
16 lightly as to suggest an egregious disregard" of Plaintiff's
17 rights. 146 F.3d at 671. The undisputed evidence shows that: (1)
18 the USW timely filed Plaintiff's grievance with Tesoro, Kirbyson
19 Dep. 332:12-23; (2) Rojek met with Tesoro's human resources
20 representative in an attempt to return Plaintiff to a position at
21 Tesoro that he could perform despite his medical restrictions,
22 First Kirbyson Decl. ¶ 10; (3) the USW communicated with Plaintiff
23 on multiple occasions regarding the status of his grievance between
24 December 2008 and February 2009, Kirbyson Decl. ¶¶ 16, 17, 19, 20;
25 and (4) the USW participated in a two-party arbitration meeting
with Tesoro regarding Plaintiff's grievance on May 5, 2009, Second
Hewitt Decl. Ex. F ("McCormack Letter") at 2. As Plaintiff notes,
the evidence also shows that the USW: (1) did not communicate with
Plaintiff regarding his grievance for approximately six months from

1 February 2009 to the filing of this lawsuit on August 28, 2009,
2 Kirbyson Decl. ¶ 20;⁸ (2) did not request any information or
3 documentation from Plaintiff in order to pursue his grievance,
4 Kirbyson Decl. ¶ 18; and (3) failed to timely request third-party
5 arbitration after the two-party arbitration meeting held on May 5,
6 2009 proved unsuccessful, McCormack Letter at 2.

7 Although the USW's pursuit of Plaintiff's grievance was not as
8 zealous as it could have been, the USW's conduct does not rise to
9 the level of egregious disregard for Plaintiff's rights, and the
10 USW did not fail to conduct a minimal investigation. Therefore,
11 the USW's handling of Plaintiff's grievance was an exercise of
12 judgment by the union, not a ministerial act. Accordingly, to
13 defeat the USW's Motion, Plaintiff must produce evidence sufficient
14 to create a triable issue of fact that the USW engaged in
15 discriminatory or bad faith conduct.

16 When examining a union's act of judgment, a plaintiff seeking
17 to prove discriminatory conduct on the part of the union must
18 present "substantial evidence of discrimination that is
19 intentional, severe, and unrelated to legitimate union objectives."
20 Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am.

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22 ⁸ Plaintiff relies on Robesky v. Qantas Empire Airways, Ltd., 573
23 F.2d 1082, 1089 (9th Cir. 1978) to argue that the USW's failure to
24 communicate with him after February 2009 amounts to a breach of the
25 USW's duty. This reliance is misplaced. In Robesky, the plaintiff
26 alleged that her union breached its duty of fair representation by
27 negotiating a settlement of her claim against her employer and
28 withdrawing her grievance from arbitration as a condition of the
settlement without informing her. Id. at 1087. The trial court
entered judgment in favor of the union, finding no evidence of
discrimination or bad faith by the union. Id. at 1086. The Ninth
Circuit held the trial court applied the wrong standard when
assessing the union's conduct, holding that the union should be
held liable even if its conduct was merely arbitrary. Id. Robesky
does not compel a different conclusion in this case; the union's
failure to communicate with the plaintiff in that case was much
more egregious than the facts at issue here.

1 v. Lockridge, 403 U.S. 274, 301 (1971) (internal quotations
2 omitted). A plaintiff seeking to prove bad faith on the part of
3 the union must introduce "substantial evidence of fraud, deceitful
4 action or dishonest conduct" on the part of the union. Id. at 299.

5 Here, Plaintiff points to no evidence of bad faith or
6 discriminatory conduct by the USW and the Court finds none.
7 Plaintiff's central complaints are that the union did not update
8 him on the status of his grievance between February and August of
9 2009, did not ask him for documentation about his grievance, and
10 did not timely request third-party arbitration. Even when viewed
11 in the light most favorable to Plaintiff, none of the evidence
12 suggests that the USW acted in a discriminatory way that was
13 "intentional, severe, and unrelated to legitimate union objectives"
14 or that the USW engaged in "fraud, deceitful action, or dishonest
15 conduct." Id. at 301. Accordingly, the Court grants summary
16 judgment in favor of the USW on Plaintiff's claim for breach of the
17 duty of fair representation.⁹

18 **B. Tesoro's Motion**

19 Plaintiff asserts six claims against Tesoro: (1) violation of
20 the USERRA; (2) violation of the ADA; (3) violation of the FEHA;
21 (4) wrongful termination in violation of public policy; (5)
22 violation of the California Military and Veterans Code § 389; and
23 (6) breach of contract. See SAC. Tesoro moves for summary
24 adjudication of all six claims. Tesoro also moves for summary
25 adjudication of Plaintiff's demand for punitive damages and forward
26 pay.

27 As an initial matter, Plaintiff does not oppose Tesoro's
28

⁹ The Court does not reach the USW's argument that Plaintiff's claim is barred by the statute of limitations.

1 Motion with regard to Plaintiff's claim for violation of California
2 Military and Veterans Code § 389. Opp'n to Tesoro Mot. at 1 n.1.
3 The Court therefore GRANTS summary adjudication of this claim in
4 favor of Tesoro.

5 1. ADA and FEHA claims

6 Plaintiff alleges that Tesoro discriminated against him on the
7 basis of his disability in violation of the ADA and its California
8 analog, the FEHA. He further alleges that Tesoro violated the ADA
9 and FEHA by failing to engage in an interactive process to find
10 reasonable accommodations for his disability. Tesoro argues that
11 the evidence adduced during discovery is insufficient to create a
12 genuine issue of material fact as to these claims.

13 a. Discrimination Claims

14 The ADA and FEHA prohibit covered employers from
15 discriminating against employees on the basis of a physical or
16 mental disability. See 42 U.S.C. § 12101 et seq.; Cal. Gov. Code §
17 12900 et seq. Both statutes prohibit employers from terminating a
18 disabled employee because of the employee's disability if
19 reasonable accommodation is possible without undue hardship to the
20 employer.¹⁰ Id.

21 The ADA prohibits an employer from discriminating "against a
22 qualified individual with a disability because of the disability."
23 42 U.S.C. § 12112(a). Thus, to establish a prima facie case under
24 the ADA, Plaintiff "must show that (1) [he] is a disabled person

25 ¹⁰ "[T]he FEHA provisions relating to disability discrimination are
26 based on the ADA," and courts typically examine claims under these
27 statutes in conjunction with one another. See Humphrey v. Mem'l
Hosp. Ass'n, 239 F.3d 1128, 1133 n.6 (9th Cir. 2001).
28 Accordingly, the Court examines Plaintiff's state and federal
disability claims together, relying on federal authority in the
absence of contrary or differing state law. Id.

1 within the meaning of the ADA; (2) [he] is a qualified individual,
2 meaning [he] can perform the essential functions of [his] job; and
3 (3) [Tesoro] terminated [him] because of [his] disability."¹¹ Nunes
4 v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1246 (9th Cir. 1999). The
5 ADA further defines the second prong of the *prima facie* case,
6 "qualified individual with a disability," as an "individual with a
7 disability who, with or without reasonable accommodation, can
8 perform the essential functions of the employment position that
9 such individual holds or desires." 42 U.S.C. § 12111(8); see also
10 29 C.F.R. § 1630.2(m). To prove that he is a "qualified individual
11 under the statute, Plaintiff must show (1) that a reasonable
12 accommodation existed that would have enabled him to perform the
13 essential functions of his former position, or (2) that he
14 possessed the necessary qualifications and physical ability to
15 perform another vacant position with the employer. Zukle v.
16 Regents of Univ. of California, 166 F.3d 1041, 1046-47 (9th Cir.
17 1999); Nadaf-Rahrov v. The Neiman Marcus Group, Inc., 166 Cal. App.
18 4th 952, 963 (2008).

19 Tesoro argues that Plaintiff has failed to create a triable
20 issue of fact as to whether he was able to perform the essential
21 functions of his former position as an operator or any other vacant
22 position, with or without accommodation. Tesoro Mot. at 11.
23 Plaintiff concedes that he could not perform the duties of his
24 former position as an operator, even with reasonable
25 accommodations, but argues that he was qualified and physically
26 able to perform the duties of at least three other vacant positions

27 ¹¹ Tesoro does not challenge Plaintiff's disabled status or the
28 allegation that Plaintiff was terminated due to his disability.
Thus, the issue is whether Tesoro failed to make reasonable
accommodation for Plaintiff as a disabled individual.

1 at the refinery: lab analyst, training coordinator, and custodian
2 II. Opp'n to Tesoro Mot. at 17. Viewing the evidence in the light
3 most favorable to Plaintiff, as it must, the Court finds that
4 Plaintiff has adduced sufficient evidence to withstand summary
5 judgment on this issue.

6 Based on Angel's assessment of Plaintiff's physical
7 limitations and a review of the functional activities of each
8 position, Tesoro concluded that Plaintiff was physically unable to
9 perform the essential functions of the custodian II, lab analyst,
10 and training coordinator positions. Daniels Decl. ¶¶ 11, 13, 15.
11 Tesoro further concluded that the seniority provisions of the CBA
12 precluded Tesoro from offering Plaintiff the lab analyst position
13 because a more senior employee had bid for the position, and that
14 Plaintiff lacked the requisite experience to qualify for the
15 training coordinator position. Daniels Decl. ¶¶ 13, 15.

16 A review of the evidence reveals several genuine issues of
17 material fact as to whether Plaintiff was in fact qualified for and
18 physically able to perform the essential functions of vacant
19 positions at Tesoro. Issues of fact exist as to whether Tesoro's
20 assessment of Plaintiff's physical limitations was accurate, and if
21 not, whether a more accurate assessment would have revealed that
22 reasonable accommodations for Plaintiff's disability were possible.

23 Tesoro's determination that Plaintiff was physically unable to
24 perform the duties of the vacant positions was based in large part
25 on Angel's assessment of Plaintiff's restrictions. Daniels Decl. ¶
26 9. Viewed in the light most favorable to Plaintiff, the evidence
27 suggests that Angel's assessment was based largely on the USAF's
28 determination that Plaintiff's limitations included "no running,
climbing, or standing for long periods of time." Angel did not

1 perform a physical examination of Plaintiff and did not inquire
2 into the precise amounts of time that Plaintiff was able to walk or
3 stand. First Kirbyson Decl. ¶ 12. Rather, Angel assumed,
4 mistakenly according to Plaintiff, that Plaintiff was incapable of
5 standing for more than ten minutes per hour. Angel Dep. at 65:5-
6 15. Assuming the truth of Plaintiff's testimony, as the Court
7 must, Plaintiff was capable of standing for between four and five-
8 times longer than Angel concluded. Second Kirbyson Decl. ¶ 17.

9 Additionally, according to Plaintiff, Tesoro did not accept
10 Plaintiff's repeated offers to provide additional information. Id.
11 ¶ 16. Although Tesoro had a "Health Professional's Statement of
12 Impairment of Lower Extremities and/or Ambulation" form that could
13 be completed by an employee's treating physician to obtain
14 information about the employee's specific limitations, it did not
15 provide this form to Plaintiff prior to his termination. Id. ¶ 13;
16 Second Hewitt Decl. ¶ 6 Ex. D ("Statement of Impairment"). This
17 form asks physicians to provide information about, *inter alia*, the
18 maximum number of minutes or hours at a time that the disabled
19 employee can stand, walk, or climb stairs. Statement of Impairment
20 at 1. According to Plaintiff's treating physician, none of the
21 requirements for the lab analyst or training coordinator positions
22 would violate Plaintiff's permanent restrictions. Tunguyen-Conner
23 Decl. ¶ 6. Viewed in the light most favorable to Plaintiff, the
24 evidence suggests that Tesoro's decisions, such as its
25 determination that Plaintiff could not fulfill the lab analyst
26 requirement of "frequently mov[ing] from side to side and mov[ing]
27 around the lab," or the custodian II requirement of being able to
28 walk and stand for long periods of time, may have been based on

1 incomplete and misinterpreted information.¹² McCormack Decl. ¶ 8.

2 Additionally, viewing the evidence in the light most favorable
3 to Plaintiff, a triable issue of fact exists as to whether a
4 temporary leave of absence might have served as a reasonable
5 accommodation that would have enabled Plaintiff's foot to heal
6 substantially. See Humphrey, 239 F.3d at 1135 ("A leave of absence
7 may be a reasonable accommodation under the ADA.") Plaintiff
8 informed Angel that his plantar fasciitis was a recent development
9 for which he was currently undergoing treatment and did not yet
10 have a long-term prognosis. Second Kirbyson Decl. ¶ 11. Again,
11 despite Plaintiff's offers to provide more information, Tesoro did
12 not request information from Plaintiff's treating physician as to
13 whether his condition might improve in the near future and did not
14 discuss with Plaintiff whether a temporary leave of absence might
15 provide a reasonable accommodation. Id. ¶¶ 13, 23, 28.

16 The evidence further reveals a triable issue of fact as to
17 whether Tesoro was precluded by seniority issues from offering
18 Plaintiff the lab analyst position, as Plaintiff has produced
19 evidence that an employee with less seniority than Plaintiff was
20 awarded the position just two days after Plaintiff was terminated.

21

22 ¹² Tesoro forcefully argues that it was Plaintiff who provided the
23 USAF assessment and that it was Plaintiff's obligation to provide
24 more accurate information to Tesoro if Plaintiff disagreed with
25 Tesoro's assessments of his physical limitations. See, e.g.,
26 Tesoro Reply at 1, 8 (citing Rund v. Charter Comm'cs, Inc., No. S-
27 05-00502, 2007 U.S. Dist. LEXIS 19707, at *27-28 (E.D. Cal. Mar.
28 20, 2007)). However, according to Plaintiff, it was not the USAF's
evaluation that he disputed but rather Angel's interpretation of
the evaluation. For example, Plaintiff did not know until this
litigation that Angel had interpreted the USAF's remarks to mean
that Plaintiff could not stand for more than ten minutes per hour.
Second Kirbyson Decl. ¶ 17. Additionally, here, unlike in Rund,
Plaintiff declared that he repeatedly offered to provide Tesoro
with more information about his condition prior to his termination,
but his offers were denied. Second Kirbyson Decl. ¶ 16.

¹ Second Hewitt Decl. Ex. I ("Daniels Dep.") at 152:6-25, 153:1-13.

2 In light of the existence of genuine issues of material fact,
3 the Court DENIES summary adjudication of Plaintiff's FEHA and ADA
4 discrimination claims.

b. Interactive Process

Both the ADA and the FEHA require employers to engage in a good faith interactive process with disabled employees in an effort to determine whether reasonable accommodation of the employee's disability is possible. "Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations." Humphrey, 239 F.3d at 1137; see also Cal. Gov. Code § 12940(n).¹³ "The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process. Employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible."¹⁴

21 ¹³ Section 12940(n) of the California Government Code makes it
22 unlawful for an employer "to fail to engage in a timely, good
23 faith, interactive process with the employee or applicant to
determine effective reasonable accommodations, if any, in response
to a request for reasonable accommodation by an employee or
applicant with a known physical or mental disability. . . ."

²⁴ ¹⁴ Under the ADA, an employee may only prevail on a claim for failure to engage in the interactive process if he or she first establishes that a reasonable accommodation would in fact have been possible. California courts are divided on whether FEHA imposes the same requirement or whether employers may be liable under FEHA for failure to engage in the interactive process regardless of whether a reasonable accommodation was in fact possible. Compare Nadaf-Rahrov v. The Neiman Marcus Group, Inc., 166 Cal. App. 4th 952, 977 (2008), with Wysinger v. Automobile Club of Southern California. This split in California authority does not affect the Court's ruling on Tesoro's motion because the Court finds a genuine

1 Id. (internal quotations omitted).

2 ADA regulations require the employer to "[c]onsult with the
3 individual with a disability to ascertain the precise job-related
4 limitations imposed by the individual's disability and how those
5 limitations could be overcome with a reasonable accommodation." 29
6 C.F.R. Pt. 1630, App. § 1630.9; see also *Barnett v. U.S. Air, Inc.*,
7 228 F.3d 1105, 1114 (9th Cir. 2000). The regulations further
8 require that the employer, "[i]n consultation with the individual
9 to be accommodated, identify potential accommodations and assess
10 the effectiveness each would have in enabling the individual to
11 perform the essential functions of the position." Id. Triable
12 issues of fact exist as to whether Tesoro fulfilled these
13 requirements.

14 First, triable issues of fact exist as to whether Tesoro
15 adequately consulted with Plaintiff to ascertain his precise job-
16 related limitations. As explained above, Plaintiff's evidence
17 suggests that Angel's determination of Plaintiff's limitations was
18 based primarily on the general remarks of the USAF evaluation
19 rather than a thorough inquiry into Plaintiff's "precise job-
20 related limitations."

21 Second, according to Plaintiff's evidence, Tesoro did not
22 identify and discuss with Plaintiff any possible accommodations for
23 his disability. Second Kirbyson Decl. ¶¶ 25-26. Tesoro did not
24 present any vacant positions to Plaintiff or discuss with Plaintiff
25 possible accommodations that might allow him to perform the
26 essential functions of those positions. Id. Rather, it was
27 Plaintiff who identified the open positions of lab analyst and
28

issue of fact as to whether reasonable accommodation of Plaintiff's disability was possible.

1 training coordinator and presented them to Tesoro as possibilities.
2 Id. at ¶ 20. While Tesoro's evidence suggests that it did in fact
3 consider other positions, the purpose of the interactive process
4 requirement is to incentivize a "cooperative dialogue." Barnett,
5 228 F.3d at 1115. Plaintiff's evidence suggests that little
6 dialogue took place in this case. Plaintiff had two brief meetings
7 with Tesoro representatives -- one with Angel and one with Daniels.
8 Kirbyson Decl. ¶¶ 10, 19. Tesoro then conducted an internal review
9 of possible accommodations and proceeded to inform Plaintiff that
10 it had determined no accommodations were possible. Id. ¶¶ 26, 28;
11 Daniels Decl. ¶¶ 11-14. In Barnett, the Ninth Circuit found that
12 U.S. Air failed to engage in an adequate interactive process when
13 it rejected three accommodations proposed by the Plaintiff and
14 offered no alternatives. Id. at 1116. Similarly here, Plaintiff's
15 evidence creates a triable issue as to whether Tesoro rejected
16 Plaintiff's proposed accommodations and offered no practical
17 alternatives in response.

18 In light of these numerous issues of material fact, the Court
19 DENIES summary adjudication of Plaintiff's FEHA and ADA interactive
20 process claims.

21 2. USERRA claim

22 The USERRA was enacted to "prohibit employment discrimination
23 on the basis of military service" and to provide "prompt
24 reemployment" to individuals engaged in non-career military
25 service. Coffman v. Chugach Support Servs., Inc., 411 F.3d 1231,
26 1234 (11th Cir. 2005) (citing 38 U.S.C. § 4301). The Act provides
27 that veterans returning from military service shall not be denied
28 reemployment or any benefit of employment by their employer because
of their military service. 38 U.S.C. § 4311(a). The USERRA

1 further requires an employer to reemploy a former employee
2 returning from military service of more than ninety days in the
3 position that he or she would have naturally attained (or a
4 position of similar seniority, pay, and duties) if not for the
5 interruption of his or her employment, unless the employee is not
6 qualified for such a position. 38 U.S.C. § 4313(a)(2)(A)-(B). If
7 the employee is not qualified for such a position because of a
8 disability incurred in, or aggravated during, military service,
9 then the employer "must make reasonable efforts to accommodate that
10 disability and to help the employee become qualified to perform the
11 duties of his or her reemployment position." 20 C.F.R. § 1002.225.
12 If, despite the employer's reasonable efforts, the employee is
13 still not qualified to perform the duties of the reemployment
14 position, then the employer is not required to reemploy him or her.
15 20 C.F.R. 1002.226(a).¹⁵

16 A service member who is reemployed upon returning from
17 service, and who was employed for more than 180 days before
18 departing for service, may not be discharged without cause for one
19 year. 38 U.S.C. § 4316(c)(1). Service members returning from a
20 period of service more than 180 days long generally must notify
21 their employer of their intent to return to work within ninety days
22 -- if the service member is convalescing from a service-related
23 disability, then this notice period is extended for up to two
24 years. 38 U.S.C. § 4312(e).

25 ¹⁵ Title 20 section 1002.226(a) of the Code of Federal Regulations
26 states: "USERRA requires that the employee be qualified for the
27 reemployment position regardless of any disability. The employer
28 must make reasonable efforts to help the employee to become
qualified to perform the duties of this position. The employer is
not required to reemploy the employee on his or her return from
service if he or she cannot, after reasonable efforts by the
employer, qualify for the appropriate reemployment position."

1 In his SAC, Plaintiff alleges that Tesoro violated the USERRA
2 by discriminating against him on the basis of "his disability
3 and/or military service." SAC ¶ 33. Plaintiff has apparently
4 abandoned his theory that Tesoro discriminated against him on the
5 basis of his military service. As noted above, Plaintiff does not
6 oppose summary adjudication of his claim for discrimination based
7 on military service under California Military and Veterans Code §
8 389, and Plaintiff does not argue in his Opposition that Tesoro
9 discriminated against him on the basis of his military services.
10 Rather, Plaintiff argues that Tesoro violated USERRA regulations by
11 failing to make reasonable efforts to accommodate his disability.
12 Opp'n to Tesoro Mot. at 22.¹⁶

13 As explained above, the Court finds that there is a triable
14 issue of fact as to whether Tesoro failed to reasonably accommodate
15 Plaintiff's disability. Thus, the Court DENIES Tesoro's Motion
16 with regard to Plaintiff's claims for disability discrimination
17 under the USERRA.

18 3. Wrongful Termination in Violation of Public Policy

19 Tesoro argues that summary judgment should be granted on
20 Plaintiff's wrongful termination claim for the same reasons as his
21 ADA and FEHA claims, namely, that Plaintiff failed to create a
22 triable issue of fact as to the existence of reasonable

23 ¹⁶ In his Opposition, Plaintiff also argues that Tesoro violated §
24 4312(e) of the USERRA, which provides that service members
25 convalescing from an injury have up to two years to notify their
26 former employer of their desire for reemployment. Opp'n to Tesoro
27 Mot. at 21. Plaintiff construes this section of the statute as
28 requiring Tesoro to wait two years to see if Plaintiff's disability
improves before terminating Plaintiff and thus contends that Tesoro
violated this provision by terminating him approximately one month
after his return from service. Opp'n to Tesoro Mot. at 22.
Because the Court finds that genuine issues of material fact as to
Plaintiff's disability discrimination allegations preclude granting
summary judgment in favor of Tesoro on Plaintiff's USERRA claim,
the Court does not reach this argument.

1 accommodations for his disability. Tesoro Mot. at 10. As outlined
2 above, the Court finds that a triable issue of fact exists as to
3 whether Plaintiff has met his burden on this issue. Thus, the
4 Court finds that summary adjudication of Plaintiff's wrongful
5 termination claim is not warranted and DENIES Tesoro's Motion with
6 regard to this claim.

7 4. Breach of Contract

8 Plaintiff alleges that Tesoro breached the CBA by terminating
9 him without just cause and violating the CBA's seniority
10 provisions. SAC ¶ 60. Tesoro argues that Plaintiff's breach of
11 contract claim is derivative of his other discrimination claims and
12 therefore "fails for those same reasons." Tesoro Mot. at 23.
13 Because the Court finds that Plaintiff has created a genuine issue
14 of material fact as to his discrimination claims, the Court
15 likewise finds a triable issue of fact as to whether Tesoro's
16 actions breached the seniority and just cause provisions of the
17 CBA. The Court therefore DENIES Tesoro's Motion as to this claim.

18 5. Plaintiff's Demand for Punitive Damages

19 Plaintiff seeks punitive damages from Tesoro. SAC at 14.
20 Tesoro argues that Plaintiff has failed to create a triable issue
21 that Tesoro acted with "malice, oppression, or fraud" and therefore
22 cannot recover punitive damages as a matter of law. Tesoro Mot. at
23 24. In response, Plaintiff argues that Rios's email instructing
24 Daniels to "find out . . . how best to move [Plaintiff] out of the
25 organization," along with the "totality of circumstances" of the
26 case, are sufficient to withstand summary judgment as to the
27 availability of punitive damages. Opp'n to Tesoro Mot. at 24.

28 As an initial matter, the Court notes that Tesoro relies on
the California standard for punitive damages, which provides that a

1 plaintiff may only recover punitive damages upon a showing by clear
2 and convincing evidence that the defendant is guilty of
3 "oppression, fraud, or malice." Cal. Civ. Code § 3294(a). While
4 this standard governs the availability of punitive damages for
5 Plaintiff's state law claims, the standard for availability of
6 punitive damages for violation of the ADA, as set forth in 42
7 U.S.C. § 1981a, is different. Section 1981a provides that a
8 plaintiff in an ADA intentional discrimination suit may recover
9 punitive damages if he or she demonstrates that his or her employer
10 engaged in a discriminatory practice "with malice or with reckless
11 indifference to [the plaintiff's] federally protected rights." 42
12 U.S.C. § 1981a(b)(1). See 42 U.S.C. § 1981a. According to the
13 U.S. Supreme Court, the terms "malice" or "reckless indifference"
14 in § 1981a pertain to the employer's knowledge that it may be
15 acting in violation of federal law. Kolstad v. ADA, 527 U.S. 526,
16 535 (1999).

17 In support of his punitive damages demand, Plaintiff points to
18 the email exchange between Tesoro Human Resources Manager Rios and
19 Human Resources representative Daniels. Opp'n to Tesoro Mot. at
20 24. Plaintiff argues that Rios's statement that Daniels should
21 "[f]ind out from [the corporate office in San Antonio] how best to
22 move [Plaintiff] out of the organization" could lead a reasonable
23 jury to impose punitive damages. See Rios email. However, when
24 the entirety of the email exchange is considered, Plaintiff's
25 argument fails. Daniels responded to Rios that she was still
26 looking at two other positions - training coordinator and custodian
27 II. Id. Rios replied: "OK, the training coord[inator] position is
28 an interesting possibility." Id. The full exchange, considered as
a whole, suggests that Rios and Daniels were actively considering

1 whether they could accommodate Plaintiff's disability. The
2 exchange does not support a reasonable inference that Rios and
3 Daniels were acting with knowledge that they may be violating
4 federal law.

5 Plaintiff points to no other evidence in support of its
6 punitive damages claim, noting instead that the "totality of the
7 circumstances" warrant punitive damages. It is not the Court's
8 task to "scour the record in search of a genuine issue of triable
9 fact" where counsel has not highlighted the evidence creating one.
10 Keenan v. Allan, 91 F.3d 1275, 1278 (9th Cir. 1996). Because it
11 finds no evidence that could lead a reasonable jury to conclude
12 that Tesoro acted with malice or reckless indifference to
13 Plaintiff's rights, the Court GRANTS Tesoro's Motion with regard to
14 Plaintiff's demand for punitive damages.

15 6. Plaintiff's Demand for Recovery of Future Wages

16 Plaintiff seeks to recover compensatory damages including lost
17 future wages and fringe benefits. SAC at 14. Tesoro argues that
18 Plaintiff's rejection of Tesoro's employment offer on the eve of
19 this litigation precludes recovery of such "front pay" as a matter
20 of law. Tesoro Mot. at 23. In response, Plaintiff argues first
21 that damages issues are not appropriate for consideration on
22 summary judgment. Second, Plaintiff argues that Tesoro's offer of
23 employment was not truly an "offer" because it was subject to
24 Plaintiff completing his bachelor's degree, which he had not yet
25 completed at the time. Opp'n to Tesoro Mot. at 25.

26 Plaintiff's unsupported contention that damages issues may not
27 be resolved on summary judgment is incorrect. See, e.g., Caudle v.
28 Bristow Optical Co., 224 F.3d 1014, 1022 (9th Cir. 2000) (affirming
district court's grant of summary judgment as to employer's

1 liability for back pay past a certain date where plaintiff failed
2 to mitigate damages). However, the Court finds merit in
3 Plaintiff's argument that Tesoro's offer does not insulate it from
4 liability for front pay because Plaintiff was incapable of
5 accepting the offer. Tesoro seeks to avail itself of the principle
6 set forth in Ford Motor Co. v. Equal Emp't Opportunity Comm'n, 458
7 U.S. 219, 241 (1982), that "absent special circumstances," an
8 employer's potential liability for lost wages ceases to accrue at
9 the time the claimant rejects an employer's unconditional offer of
10 either the same job as, or one "substantially equivalent" to, the
11 job from which the claim arose. Tesoro's reliance on Ford Motor is
12 misplaced. Implicit in the Ford Motor principle is the assumption
13 that the employer's offer is one that the employee is capable of
14 accepting. Here, it is undisputed that Tesoro's offer was
15 contingent upon Plaintiff providing proof that he had attained a
16 bachelor's degree. McCormack ¶ 13. Plaintiff was incapable of
17 meeting this requirement because he had not yet obtained his
18 degree. Opp'n to Tesoro Mot. at 25. The Court therefore rejects
19 Tesoro's contention that, as a matter of law, Plaintiff is
20 precluded from seeking front pay by virtue of having rejected
21 Tesoro's August 20, 2009 offer of reemployment.

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V. CONCLUSION

2 For the reasons stated above, the Court GRANTS IN PART and
3 DENIES IN PART the Motion for Summary Judgment, or in the
4 alternative, Summary Adjudication, filed by Defendant Tesoro
5 Refining and Marketing Company. The Court GRANTS the Motion with
6 respect to Plaintiff George Kirbyson's sixth claim for violation of
7 California Military and Veterans Code § 389 and with respect to
8 Plaintiff's demand for punitive damages. The Court DENIES the
9 Motion with respect to Plaintiff's claims for violation of the
10 Uniformed Services Employment and Reemployment Rights Act,
11 violation of the Americans with Disabilities Act, violation of
12 California's Fair Employment and Housing act, wrongful termination
13 in violation of public policy, and breach of contract.

14 For the reasons stated above, the Court GRANTS the Motion for
15 Summary Judgment filed by Defendant United Steel Workers, Local 5.

16 All parties shall appear for the pretrial conference on
17 November 18, 2011, at 10:00 a.m. in Courtroom 1, on the 17th floor,
18 U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102.

20 || IT IS SO ORDERED.

22 || Dated: June 17, 2011

Samuel L. Long
UNITED STATES DISTRICT JUDGE